

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

VANCE JOHNSON,
Appellant.

No. 2 CA-CR 2015-0375
Filed August 8, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pinal County
No. S1100CR201201686
The Honorable Joseph R. Georgini, Judge

AFFIRMED AS CORRECTED

COUNSEL

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STATE v. JOHNSON
Decision of the Court

MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

STARING, Judge:

¶1 Vance Johnson appeals from the trial court's order, after remand, resentencing him to an enhanced, somewhat aggravated, twenty-five-year term of imprisonment. We affirm his sentence.

¶2 Following a jury trial, Johnson was convicted of one count of dangerous or deadly assault by a prisoner and sentenced to an enhanced, maximum term of imprisonment of twenty-eight years. On appeal, this court affirmed Johnson's conviction but remanded the case for resentencing, based on the trial court's mistaken consideration, as aggravating factors, of Johnson's "infliction or threatened [i]nfliction of serious physical injury" and his "use of, threatened use or possession of a deadly weapon or dangerous instrument during the commission of the crime." *State v. Johnson*, No. 2 CA-CR 2014-0136, ¶¶ 12-15 (Ariz. App. Mar. 30, 2015) (mem. decision). As the state conceded in that proceeding, *id.* ¶ 12, those factors were also "essential element[s] of the offense of conviction," A.R.S. § 13-701(D)(1), (2), and so could not properly be considered in imposing an aggravated sentence, *see id.* (exception for finding aggravating circumstance of infliction of serious physical injury or use of deadly weapon when such circumstance is essential element of offense).

¶3 On remand, the trial court found the remaining aggravating circumstances outweighed mitigating circumstances

STATE v. JOHNSON
Decision of the Court

and resentenced Johnson to an enhanced, somewhat aggravated prison term of twenty-five years.¹ This appeal followed.

Discussion

¶4 On appeal, Johnson argues the trial court “gave improper weight to aggravating circumstances and disregarded a mitigating circumstance it was obliged to consider,” apparently referring to his counsel’s representation at resentencing that “[a]t the time of the offense [Johnson] was being treated with psychotropic medication for depression.” With respect to the weight accorded aggravating factors, Johnson argues the court improperly “triple count[ed] one aggravating factor” in stating it had weighed heavily the harm to the victim, the surgeries he had required, and the viciousness of the crime, which Johnson maintains “are in fact all one factor.” Johnson also appears to argue the court improperly weighed the factor of “harm suffered by the victim” – an aggravator found by the jury and not challenged in Johnson’s first appeal – because “the victim was left permanently brain dead as a result of the assault.” According to Johnson, it was “improper for the court to impose an aggravated sentence based primarily on physical pain that an individual cannot conclusively be said to feel.” Finally, Johnson notes that one of the three prior felony convictions he admitted at his original sentencing hearing occurred after the

¹In mitigation, the trial court noted Johnson has a minor child to support, his efforts toward rehabilitation, and his expression of remorse during resentencing. The court found the following enumerated aggravating factors: the physical, emotional, or financial harm suffered by the victim, *see* § 13-701(D)(9); the presence of an accomplice, *see* § 13-701(D)(4); Johnson’s prior felony conviction within ten years of the offense, *see* § 13-701(D)(11); and the “viciousness of the crime,” *see* § 13-701(D)(5). The court also noted Johnson’s attempt to conceal, hide or destroy evidence of the crime and the danger he posed to the community, as evinced by the length and escalation of his criminal history. *See* § 13-701(D)(25) (other aggravating factor relevant to defendant’s character or nature of crime).

STATE v. JOHNSON
Decision of the Court

commission of the instant offense, and he argues “the court improperly considered that conviction in aggravation” under § 13-701(D)(11).

¶5 This court will not disturb a sentence within the statutory range absent an abuse of discretion. *State v. Hernandez*, 231 Ariz. 353, ¶ 3, 295 P.3d 451, 453 (App. 2013). “And we will find such an abuse of discretion ‘only if the court acted arbitrarily or capriciously or failed to adequately investigate the facts relevant to sentencing.’” *Id.*, quoting *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). We find no such abuse of discretion here.

Mitigating Circumstances

¶6 Johnson argues § 13-701(E) “imposes a mandatory duty on the trial court to consider evidence of ‘impaired capacity’ in mitigation.” That statute provides that, in imposing sentence, a court “shall consider” as a mitigating circumstance a finding that a “defendant’s capacity to appreciate the wrongfulness of [his] conduct or to conform [his] conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.” § 13-701(E)(2). But a court “is not required to find that mitigating circumstances exist merely because mitigating evidence is presented; the court is only required to give the evidence due consideration,” and the weight to be given any mitigating evidence “rests within the trial court’s sound discretion.” *Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d at 357. Moreover, Johnson has not identified any evidence suggesting his depression caused a diminished capacity to appreciate the wrongfulness of his acts or to conform to the law, such that it required consideration under § 13-701(E)(2). Although the court was free to consider Johnson’s mental health history as another mitigating factor relevant to his background or to the nature of the crime, *see* § 13-701(E)(6), it was not required to do so. “[W]e presume the court considered any evidence relevant to sentencing that was before it,” *Cazares*, 205 Ariz. 425, ¶ 7, 72 P.3d at 357, and the court’s thoughtful comments at resentencing suggest it did so here.

STATE v. JOHNSON
Decision of the Court

Weight Assigned to Aggravating Factors

¶7 The trial court's imposition of a somewhat aggravated prison term was proper "only if one or more statutory aggravating circumstances [was] found or admitted," *State v. Bonfiglio*, 231 Ariz. 371, ¶ 8, 295 P.3d 948, 950 (2013), and upon finding mitigating circumstances were not "sufficiently substantial to justify [a] lesser term," § 13-701(F). But a court is not required to make its sentencing decision "based upon [the] mere numbers of aggravating or mitigating circumstances." *State v. Marquez*, 127 Ariz. 3, 7, 617 P.2d 787, 791 (App. 1980). Here, the court considered multiple aggravating factors at resentencing, including Johnson's admission of two felony convictions within ten years preceding the offense, *see* § 13-701(D)(11), and the jury's finding of harm to the victim, *see* § 13-701(D)(9). We find no abuse of discretion in the court's imposition of a somewhat aggravated term or in the weight it assigned to aggravating factors.

¶8 To the extent Johnson argues the jury's finding of harm to the victim was not supported by the evidence, or that the trial court erroneously relied on a third felony conviction that occurred after the offense in finding an aggravating circumstance pursuant to § 13-701(D)(11), we agree with the state that these issues were waived by Johnson's failure to raise them in his first appeal or at resentencing. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to argue a claim on appeal constitutes waiver); *cf. State v. Hartford*, 145 Ariz. 403, 405, 701 P.2d 1211, 1213 (App. 1985) (appeal limited by scope of remand for resentencing; conviction not subject to challenge).

¶9 However, even if not waived, we find no merit to these arguments. We reject Johnson's suggestion that a victim who remains comatose from an offense has not suffered "harm" under § 13-701(D)(9) unless the state provides evidence that he experiences pain. And, although one of the prior convictions identified in the trial court's minute entry occurred after he committed this offense, two other convictions supported the court's finding of a single aggravating circumstance under § 13-701(D)(11), as well as the enhancement of Johnson's sentence pursuant to A.R.S. § 13-703(C)

STATE v. JOHNSON
Decision of the Court

and (J). *Cf. State v. Provenzano*, 221 Ariz. 364, ¶¶ 13, 15-16, 212 P.3d 56, 59-60 (App. 2009) (multiple felony convictions “collectively” constitute one aggravating factor, not multiple factors).

Correction of Sentencing Minute Entry

¶10 In the course of our review, we found discrepancies between the trial court’s oral pronouncement at resentencing and its corresponding minute entry. Generally, “the ‘[o]ral pronouncement in open court controls over the minute entry,’” and this court “can order the minute entry corrected if the record clearly identifies the intended sentence.” *State v. Ovante*, 231 Ariz. 180, ¶ 38, 291 P.3d 974, 982 (2013), *quoting State v. Whitney*, 159 Ariz. 476, 487, 768 P.2d 638, 649 (1989) (alteration in *Ovante*). We correct the court’s resentencing minute entry of October 2, 2015, to reflect the court’s sentence for a repetitive offense committed by a category three repetitive offender pursuant to A.R.S. § 13-703(C) and (J). Further, we note the court’s clear statement at Johnson’s resentencing that it was “not considering . . . in any way, shape or form” the jury’s findings regarding Johnson’s infliction of serious physical injury and his use of a deadly weapon. Accordingly, we delete the minute entry’s references to these findings as aggravating factors found in support of Johnson’s sentence.

Disposition

¶11 For the foregoing reasons, Johnson’s sentence, as corrected by this decision, is affirmed.